2013 WL 6845460 (Idaho) (Appellate Brief)
Supreme Court of Idaho

Gene L. MATTOX, Individually and as Personal Representative
of the Estate of Rosamond Vivian Mattox, Plaintiff-Appellant,
v.
LIFE CARE CENTERS OF AMERICA, INC., d/b/a Life Care of Lewiston, a Tennessee Corporation,
John Does I-V, Jane Does VI-X, and John Doe Corporations XI-XX, Defendants-Respondents.

No. 40762-2013.
December 17, 2013.

Appeal from the District Court of the Second Judicial District of the State of Idaho,
in and for Nez Perce County. Honorable Carl Kerrick, District Judge, Presiding

**Appellant's Brief - Gene L. Mattox, Individually and as Personal Representative of the Estate of Rosamond Vivian Mattox**

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### a. Nature of the Case

This is a wrongful death case brought brought by the estate and heirs of Rosamond Mattox against the Life Care Center in Lewiston, Idaho. This appeal comes after the District Court dismissed the Complaint after granting summary judgment in favor of the Defendant. The District Court struck the affidavits of the Plaintiffs' experts, holding that the affidavits were insufficient to establish that the experts had actual knowledge of the standard of care for a skilled nursing facility in Lewiston, Idaho, in October, 2008.

### b. Proceedings Below

Rosamond Mattox died on November 1, 2008, after being taken to Tri-State Hospital in Clarkston, Washington for injuries suffered in her ninth fall of 2008 at Life Care Center in Lewiston, Idaho. The complaint in this matter was filed in the Nez Perce County District Court on October 22, 2010. The Defendants answered, with a general denial, on April 5, 2011.

On May 21, 2012, Defendants moved for summary judgment, Plaintiffs responded and moved to Enlarge Time. After hearing arguments on June 19, 2012, the Court granted Plaintiffs' Motion to Enlarge.

Defendants, on October 15, 2012, filed a supplemental Motion for Summary Judgment, and ***1** Plaintiffs' responded. The hearing was held on November 13, 2012. After hearing argument and considering the pleadings, the Court entered a Memorandum Opinion and Order which granted summary judgment in favor of the Defendants. This appeal followed.

### c.Statement of Facts

Rosamond Mattox died on November 1, 2008, after being dropped or allowed to fall for the ninth (9th) time in a ten month period while residing at the Life Care Center of Lewiston (hereinafter LCL). ( R, Vol. III, p. 497, L 8.) This ninth (9th) drop or fall resulted in the second broken hip in four (4) months and added to the list of injuries and broken bones suffered in the fateful year of 2008. The falls came after LCL failed or refused to follow the established care plans and doctors orders in violation of state and federal regulations. ( R, Vol. III pp. 496 - 509.)

Dr. Jayme Mackay, the primary care physician for Ms. Mattox, summarized as follows: It is my professional opinion that Rosamond Mattox died as a result of an unbroken and reasonably anticipated chain of events that arose as result of Life Care Center of Lewiston failing to provide and use the cautions which had been ordered (either by me or by the Care Plan). The failure to use those cautions was a breach of the standard of care that was owed by Life Care Center of Lewiston to Rosamond Mattox and that breach led to a series of falls that occurred in 2008 and culminated with a fractured hip/femur. That fractured hip/femur was the cause of her death, as will be elaborated upon below.

( R, Vol. III, p 484.)

In summarizing the treatment of Mrs. Mattox, Nurse Thomason opined:

49) It is my opinion that the performance of the nursing staff of Life Care Center of Lewiston was an extreme deviation from the standard of care and nursing ***2** home practice standards for the Lewiston region in the state of Idaho for 2008, and that they fell significantly below State and Federal Guidelines when they failed to follow physicians orders, their own plan of care acted in an extremely careless and haphazard manner with an apparent disregard of consequences in the provision of care for Rosamond Mattox as evidenced by:

a) 86% non-compliance with scheduled check and change program as care planned for the months of July 2008 through October 2008.

b) 74% non-compliance with the use of bed, side rails for the months of July 2008 through October 2008.

c) 86% non-compliance with the use of the bed in the lowest position as was care planned for the months of July 2008 through October 2008.

d) 99.3% non-compliance with the use of hip protectors as was care plan for the months of July 2008 through October 2008.

e) The lack of documentation to include nursing and caregiver compliance with the consistent use of crash mats for Ms. Mattox

f) The lack of scheduled toileting intervention on the care plan for incontinent resident with a history of falls; cognitive impairment; moderately impaired decision-making; periods of altered perception; mental function of varied over the course of the day; typically unable to understand simple and direct instructions; repetitive anxious concerns and repetitive anxious physical movements.

g) The lack of documentation to indicate the provision of 2 person extensive to total assistance with bed mobility, transfers, walking, dressing and toilet use, as was identified as a need in the nursing home assessment and recommended by the physician, Dr. Mackay.

50) Federal Regulation 483.13(c) defines “neglect” as a failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness. (42 CFR 488.301) Statutory requirements of the facility old way accountable for the residents care and safety, including clinical decisions.

51) It is my professional opinion, within a reasonable degree of nursing probability, based on the review of the records of the provided, my experience, education and training, Life Care Center of Lewiston nursing staff demonstrated a pattern of neglect and failure to exercise the standard of ***3** care that reasonably prudent nursing staff would have exercised in a similar situation. In doing so it was an extreme deviation from the nursing standards and from accepted practice. These extreme deviations from the standard of care resulted in falls for Ms. Mattox and the doctors have concluded those falls proximally caused injury,

suffering, and an untimely death for Rosamond Mattox. Had LCL staff adhered to the doctor's orders and care plan Ms. Mattox would not have suffered this final fractured hip.

R, Vol. III, pp 509-510.

In support of their motion for summary judgment, LCL relied on a nine (9) sentence affidavit of Carol McIver, in which she asserts that she is the Director of Nursing for the Defendant, she is a Registered Nurse, she knows the standard of care, she reviewed the LCL records and then she concludes as follows:

Based on my actual knowledge of the applicable standard of health care practice, as it applies to the care provided by Life Care Center of Lewiston, it is my opinion, which opinion I hold to a reasonable degree of medical certainty, that the care and treatment provided to Rosamond Mattox by the staff at Life Care Center of Lewiston complied in all respects with the applicable standard of health care practice.

R, Vol. I, pp. 41-42.

Plaintiffs presented Affidavits from Dr. Jayme Mackay, and Nurse Wendy Thomason. Dr. Mackay was the treating physician for Mrs. Mattox and based his opinions on his training and experience, including his experience as the treating physician for Mrs. Mattox and other residents of skilled nursing facilities during this the relevant time. Wendy Thomason is a registered nurse with substantial qualifications, she familiarized herself with the local standard of care for skilled nursing facilities in the Lewiston region in 2008 by interviewing four local medical professionals:

***4** 1) Dr. Jayme Mackay, who was the primary care physician Mrs. Mattox and for a number of residents of area nursing facilities, he interacted with nursing staffs providing care to his patients, and had personal knowledge of the standard of care for nurses in nursing homes in the Lewiston region in 2008 (Vol. III, pp 417.);

2) Dr. Jane Fore, a physician in the Lewiston region who provides direct care to a number of nursing home residents and who had actual knowledge of the standard of care for nurses in nursing homes in the Lewiston region in 2008 ( R, Vol. III, p. 417).

3) Debbie Lemon, who holds a masters degree in Nursing with the focus on **Elderly** nursing/education; she is Associate Professor of Nursing, BSN program at Lewis-Clark State College in Lewiston; Nurse Consultant for an adult family home; she was a clinical nursing instructor for Walla Walla Community College (in Clarkston, Washington, and in the Lewiston region) teaching long term care from 2002 - 2004; is a former Nurse Consultant for Guardian Angel Assisted Living Homes; and is the former Administrator of Tri-State Health and Rehabilitation Center in Clarkston Washington. Tri-State Health and Rehabilitation Center is a 104-bed nursing home with Medicare/Medicaid certification and an Alzheimers' Unit. ( R, Vol. III, p. 495). During the time of the events that gave rise to this suit, Ms. Lemon was teaching “Res-Care Home Care: Assessments/ Care plans and caregiver training” and “Practical Nursing” at Lewis-Clark State College as an Associate Professor in the BSN program, she maintained her position as the Nurse Consultant for Sycamore Glen, and she had just completed a three-year stint as an Associate ***5** Professor for Practical Nursing which included clinical rotation for geriatric care. ( R, Vol. III, p. 516.)

4) Kelli Stellmon, a registered nurse working with **elderly** patients and who had done her own survey of nurses working in nursing homes in order to determine the local standard of care. ( R, Vol. III, p. 496.)

In addition to speaking to these four professionals, Nurse Thomason familiarized herself with the standard of care by 1) knowing and reviewing both the federal and state regulations that apply to the administration of care in a nursing homes; and 2) reading the affidavit of Carol Mclver, reviewing the CMS ratings for LCL, reviewing the Idaho surveys of LCL, reviewing of state and national awards received by LCL, and reviewing LCL's own publications of how they hold themselves out to be and the standard they publish to the world. ( R, Vol. III, p. 494-95; T, Vol 1 (November, 13, 2012), p. 20 - 21.)

The Defendants moved to strike the Affidavits of Wendy Thomason and Dr. Jayme Mackay. Defendants claimed "[t]he affidavits lack the foundational requirements necessary to meet the burden of proof on the initial negligence element of the Plaintiff's prima facia [sic] case." Then Defendant's claim that Nurse Thomason did "not identify the applicable local standard of health care practice for Lewiston, Idaho in 2008, in a long-term care facility, for a patient such as Ms. Mattox. Further the local professionals identified, fail to meet the foundation required by Idaho Code §§ 6-1012, 6-1013." ( R, Vol. III, p. 564.)

***6** Plaintiffs argued that Dr. Mackay and Nurse Thomason were competent and their testimony did meet the statutory requirements.

Further, Plaintiffs argued that Defendant's had failed to raise a genuine issue of fact, as required by IRCP 56, and therefore, the Defendant's Motion for Summary should be denied, and summary judgment should be entered for the Plaintiffs. Plaintiffs stated:

Counsel has adequately set forth in her motion to strike the requirements necessary for an expert to be able to opine and for that opinion to be properly before the Court. Rather than belaboring that law the undersigned points to it as support for the proposition that the Affidavit of Carol McIver is incompetent to establish any fact or basis for a dispute. Its self-serving nature is not a basis to ignore its contents, but its conclusory nature, wholly without substance and foundation, leaves it ineffective. The Defendants' Answer is a general denial and offers no support for their motion; they are left with a bare motion supported by a vague and conclusory affidavit. It should be noted that Defense counsel also has an affidavit before the court with several exhibits of what are claimed to be records relating to this case. Even ignoring that counsel is an incompetent witness, as counsel sets forth in her own motions and memoranda, this is an area that requires expert testimony and the mere presence of records does not create an issue of fact for the court.

This leaves the Court in the uncommon position of having two credible experts' affidavits establishing negligence on the part of the defendant, and nothing in the record capable of raising a genuine issue to the contrary.

R, Vol. II, pp 410-411.

After the hearing on the Motion for Summary Judgment, the Court ruled that: While it is evident that Ms. Thomason and her colleagues are well versed in the care of **elderly** patients, this alone is not sufficient to meet the requirements of I.C. § 6-1012 and 1013. Nothing in Thomason's affidavits establishes that Ms. Thomason became knowledgeable regarding the local standard of care by speaking with an individual who was familiar with the local standard of skilled nursing facility care, ***7** in Lewiston, Idaho, in October and November of 2008. Ms. Thomason's inquiry of physicians is inadequate for purposes of this case, unless those physicians can explain why they have personal knowledge of the local standard of care for nurses in a skilled care facility in Lewiston, Idaho, in October 2008. Ms. Thomason also referred to two nurses; however, the record is silent regarding these individuals' personal experience regarding the local standard of care for nurses in a skilled care facility in Lewiston, Idaho, in October, 2008. Without this information, Ms. Thomason's affidavits are not sufficient for purposes of the motions before the Court.

R, Vol. III, pp. 598-99.

The Court went on to state:

While Ms. Thomason did speak to nurses, the affidavits do not indicate these nurses possessed sufficient knowledge of the local standard of care applicable to the defendants in the same time frame of the alleged malpractice. Simply being a nurse is not sufficient, there must be a connection to skilled nursing facility care, in Lewiston, Idaho in October, 2008. Without this information, the Defendants' motion to strike is granted. As a result, the Defendants' motion for summary judgment is also granted because no evidence has been provided which raises a question of material fact regarding whether LCL was negligent in the care of Mrs. Mattox.

...

The Plaintiffs have also submitted the affidavits of Dr. Jayme Mackay in response to the Defendants' motion for summary judgment. Dr. Mackay's affidavits provide no information whatsoever regarding his knowledge of the local standard of care for nurses in a skilled nursing facility in Lewiston, Idaho, in October, 2008. Thus, for the same reasons as stated above, the Defendants' motion to strike the affidavits of Dr. Mackay is also granted. Consequently, the Defendants' motion for summary judgment is also granted because no evidence has been provided which raises a question of material fact regarding whether LCL was negligent in the care of Mrs. Mattox.

R, Vol. III, pp. 600-01.

***8 II. ISSUES PRESENTED ON APPEAL**

1) Did the trial court err in ruling that Mattox had failed to lay adequate foundation for the admission of the testimony of her nursing expert, Wendy C. Thomason, RN.?

2) Did the trial court err in ruling that Mattox had failed to lay adequate foundation for the admission of the testimony of her expert, Dr. Jayme Mackay?

3) Did the trial court err in allowing the testimony of Carol Mclver?

4) Did the trial court err by granting summary judgment to Defendants?

5) Did the trial court err by failing to grant summary judgment to Plaintiffs?

***III. ARGUMENT***

**A. Guiding Principles**

***1. On a motion for summary judgment, the record is to be reviewed and liberally construed in favor of the non-moving party with all doubts resolved against the moving party and all reasonable inferences in favor of the non-moving party.***

The Idaho courts have established standards that require the District Court, and reviewing appellate courts, to:
to liberally construe the facts in the existing record in favor of the nonmoving party, and to draw all reasonable inferences from the record in favor of the nonmoving *party. Anderson v. Ethington*, 103 ldaho 658, 660, 651 P.2d 923, 925 (1982).... "[A]ll doubts are to be resolved against the moving party." *Ashby v. Hubbard*, 100 Idaho 67, 69, 593 P.2d 402, 404 (1979). The motion must be denied "if the evidence is such that conflicting inferences can be drawn therefrom and if reasonable [people] might reach different conclusions." *Id.* [citation omitted.]

***9** *Pearson v. Parsons*, 114 Idaho 334, 338, 757 P.2d 197, 201 (1988)

***2. The admissibility of expert testimony is separate from summary judgment issues and must be determined separately.***

The standard of liberal construction and reasonable inferences does not apply to the District Court's consideration of whether the submitted affidavits are admissible. Instead, the striking of affidavits is an evidentiary ruling which is reviewed by this Court under the **abuse** of discretion standard. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 163-64, 45 P.3d 816 (Idaho 2002). The District Court is to determine whether the affidavit alleges facts, which if taken as true, would make the testimony of that witness admissible. *Rhodehonse v Stutts*, 125 Idaho 208, 211 868 P.2d 1224, 1227 (Idaho 1994).

***3. In order for expert testimony to be admissible, a proper foundation must be laid.***

... expert testimony may only be admitted in evidence if the foundation therefor is first laid, establishing (a) that such an opinion is actually held by the expert witness, (b) that the said opinion can be testified to with reasonable medical certainty, and (c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed; ....

I.C. § 6-1013. The *Rhodehouse* court amplified on this statute by stating:
Added to these requirements in the summary judgment context is the additional provision of I.R.C.P. 56(e) that the affidavits must "set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

*Rhodehouse*, at 212, 868 P.2d at 1228.

***10** ***4. The moving party has the first duty to produce admissible testimony for a summary judgment motion, and may not rely on mere allegations and conclusory statements.***

This principle is established both by rule and by caselaw. It is principally embodied in I.R.C.P. 56(e), and has been confirmed by the Idaho courts. The rule states:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

I.R.C.P. 56(e).

As set forth in the rule, the affidavits must: 1) be made on personal knowledge; 2) set forth admissible evidence, including competency of the affiant. In order for the evidence to be admissible, it must be more than mere allegations and conclusory statements, and must meet the foundational threshhold for admissibility.

The Supreme Court addressed this principle when in *Pearson* they stated:
Merely filing a motion for summary judgment is not sufficient to place the burden on the adverse party to establish that there is a genuine issue of material fact. The motion must be supported as provided in I.R.C.P. 56 in order to invoke the requirement that "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, ***11** must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e).

*Pearson*, at 338, 757 P.2d at 201. (*See also: Johnson v McPhee*, 147 Idaho 455, 460, 210 P.3d 563, 560 (2009), "When a summary judgment motion has been supported by depositions, affidavits or other evidence, the adverse party may not rest upon mere allegations or denials of that party's pleadings but by affidavits or as otherwise provided in the rule, must set forth specific

facts showing that there is a genuine issue for trial"; *Hayward v Jacks*, 141 Idaho 622, 115 P.3d 713 (Idaho 2005), "To meet this burden, the moving party must "challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case." [citation omitted].)

The principle of insufficiency of conclusory affidavits is also well-established: "Statements that are conclusory or speculative do not satisfy either the requirement of admissability or competency under Rule 56(e)." *(Dulaney*, at 164, 45 P.3d at 820, citing *Kolln v St. Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).) *(See also: Corbridge v Clark Equipment Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986)(conclusory affidavit disregarded); *Tapper Chevrolet Co. v. Hansen*, 95 Idaho 436, 439, 510 P.2d 1091, 1094 (1973)(affidavits in support or opposition to summary judgment must set forth facts admissible into evidence); *Rhodehouse*, at 213, 868 P.2d at 1229, "The trial court correctly reasoned that Jenkins' only showing of knowledge of the local standard was his unsupported conclusory statement in his affidavit, and that this was an insufficient ***12** foundation for admissibility"); *Suhadolnik v. Pressman*, 254 P.3d 11, 151 Idaho 110 (Idaho 2011), ("The affiant must have personal knowledge of the facts contained within the affidavit and statements within it cannot be conclusory or speculative. *Dulaney*, 137 Idaho at 164, 45 P.3d at 820.").

***5. Once the moving party has produced admissible testimony, the burden shifts to the non-moving party to produce sufficient admissible evidence to raise a genuine issue of material fact.***

The *Pearson* Court clearly set forth this principle:
Merely filing a motion for summary judgment is not sufficient to place the burden on the adverse party to establish that there is a genuine issue of material fact. The motion must be supported as provided in I.R.C.P. 56 in order to invoke the requirement that "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e).

*Pearson*, at 338, 757 P.2d at 201. *(See also; Litz v. Robinson*, 131 Idaho 282, 955 P.2d 113 (Idaho App. 1997), "Therefore, when the doctors submitted affidavits sufficient to support their motions for summary judgment, which Litz has not challenged in this appeal, the burden was shifted to Litz to support his claim with direct expert testimony that satisfied the requirements of I.C. §§ 6-1012 and 6-1013.")

The rule sets out this requirement with clarity:

> ... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's ***13** pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. ...

I.R.C.P. 56(e) (emphasis added.)

***6. Once admissible testimony is before the Court, the summary judgment standards apply.***

"It is axiomatic that on summary judgment, the Court views all facts and inferences from the record in favor of the nonmoving party and the moving party has the burden of proving the absence of genuine issues of material fact, [citation omitted.]".

*Rhodehouse v Stutts*, 125 Idaho 208, 210, 868 P.2d 1224, 1226 (Idaho 1994)

As will be demonstrated below, the District Court improperly struck the affidavits of Plaintiffs' s experts and erroneously granted summary judgment in favor of Defendants. Further, the Defendants did not meet the requirements of I.R.C.P. 56 as the Defendants' supporting affidavit was insufficient.

**B. Striking of Affidavits**

***1. The District Court Erred in Striking the Affidavits of Wendy C. Thomason and Dr. Jayme Mackay.***

In the instant case, the trial court **abused** its discretion by striking the affidavits of Wendy C. Thomason, RN., and Dr. Jayme Mackay. Both witnesses were sufficiently qualified, and the record was sufficiently complete for the statements to be admitted.

The District Court noted that
The question of how to qualify an out-of-area expert to render an opinion in a ***14** medical malpractice case has been described as a question that "has plagued the bench and trial bar since the enactment of Idaho's statutory structure ... requiring proof [of] actual knowledge of the local standard of care. *Keyser v Garner*, 129 Idaho 112, 117, 933 P.2d 409 (Ct. App. 1996). A common way for an out-of-area expert to become familiar with the local standard of care is to inquire of a local specialist. *Perry*, 134 Idaho 46, 51, 995 P.2d 816 (2000).

R, Vol. III, p. 597.

The Court then quotes from *Keyser* setting forth the foundational standard for an out-of-area expert:

> The foregoing cases all indicate the foundational prerequisite of familiarity with the community standard of care is satisfied by an out-of area physician's testimony that he or she has conversed about those standards with a qualified physician practicing in the community and has thereby become knowledgeable about the local standards.

[citations omitted.] R, Vol. III, p. 597.

In 2002, the Supreme Court evaluated a number of its prior cases regarding out-of-state experts and qualifying them to know the local standard. The Court summarized those cases as follows:

> This Court has examined a number of cases where a defendant moved for summary judgment based on the allegation that the plaintiff's out-of-state expert insufficiently familiarized himself with the local standard of care. **Although these cases do not provide a clear-cut set of rules on what an out-of-state expert must do to become familiar with the local standard of care, these cases demonstrate that this Court has been willing to affirm a district court's grant of summary judgment on this basis when the plaintiff's expert failed to contact any local physician. Likewise, this Court has been reluctant to grant a defendant's motion for summary judgment when the plaintiff's expert did consult a local physician possessing expertise on the area at issue**. *Dekker v. Magic Valley Reg'l Med. Ctr.*, 115 Idaho 332, 334, 766 P.2d 1213, 1215 (1988) (affirming grant of summary judgment when out-of-state experts did nothing to establish familiarity with the local standard of care); *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997) (affirming grant of summary judgment because plaintiff's expert, an ophthalmologist, was a ***15** physician, and thus the standard of care he was familiar with differed significantly from that of the defendant, an optometrist, who was not a physician); *Hoene v. Barnes*, 121 Idaho 752, 828 P.2d 315 (1992) (vacating grant of summary judgment because in cases involving a physician practicing in a unique specialty, such as cardiovascular surgery, plaintiff's expert may be unable to familiarize himself with the local standard by conversing with a local physician and no "similar Idaho communities" may exist, thus necessitating testimony from an out-of-state physician); *Dunlap By and Through Dunlap v. Garner*, 127 Idaho 599, 903

> P.2d 1296 (1994) (reversing summary judgment because the trial court's job was to look to the affidavit itself and determine whether the alleged facts, if taken as true, would render the evidence admissible, not to weigh conflicting evidence as to the truthfulness of the expert's affidavit); *Rhodehouse*, 125 Idaho at 212-13, 868 P.2d at 1228-29 (affirming summary judgment because expert's only showing of knowledge of the local standard was his unsupported conclusory statement - he did not contact any local physician and the local standard of care was not discussed in the deposition that he reviewed); *Watts v. Lynn*, 125 Idaho 341, 347, 870 P.2d 1300, 1306 (1994) (reversing grant of summary judgment because expert familiarized himself with local standards by conferring with a local dentist); *Strode v. Lenzi*, 116 Idaho 214, 216, 775 P.2d 106, 108 (1989) (affirming summary judgment where nationally certified expert claimed that his familiarity with standards set by American Academy of Orthopedic Surgeons was sufficient to familiarize himself with local standards); and *Frank v. East Shoshone Hosp.*, 114 Idaho 480, 482, 757 P.2d 1199, 1201 (1988) (affirming summary judgment where expert failed to contact any local physicians and was thus unfamiliar with the local standard).

*Grover v Smith*, 137 Idaho 247, 46 P.3d 1105 (2002) (emphasis added).

A review of cases since 2002, reveals that the Court has not changed course from that stated in *Grover*. In 2003 the Court heard *Shane v Blair*, 139 Idaho 126, 75 P.3d 180 (2003), in which the expert was from out-of-area, but as a doctor at the University of Utah his experience included taking numerous referrals from the area and reviewing hundreds of medical records from doctors in the area, which established his familiarity with the local standard at the relevant time. In 2007, the Court addressed ***16** *McDaniel v Inland Northwest Renal Care Group-Idaho LLC*, 144 Idaho 219, 159 P.3d 856 (2007) in which the out-of-area expert was excluded after testifying that there was only a national standard and having failed to contact any local physician to determine whether the local standard varied from the national standard.

In 2011, the Court addressed two cases: *Hoover v Hunter*, 150 Idaho 658, 249 P.3d 851 (2011), in which the Plaintiff attempted to be his own expert but was properly excluded when the court determined that an EMT was incompetent to testify to the standard of a gastroenterologist in a medical emergency situation. The other case was *Suhadolnikv Pressman*, 151 Idaho 110, 254 P.3d 11 (2011) in which the out-of-area expert did not contact any local professional and attempted to rely solely on the deposition of the defendant and failed to establish the applicability of any national standard, and was therefore excluded.

In 2012 the Court issued the opinion in *Arregui v Gallegos-Main*, 153 Idaho 801, 291 P.3d 1000 (2012), in which the expert's affidavit was untimely and therefore excluded. The District Court then relied on the expert's deposition, in which testified she had never been to Idaho and had never spoken with an Idaho physician.

Finally, earlier this year, the Court issued the opinion in *Hall v Rocky Mountain Emergency Physicians, LLC*, 090613 IDSCCI 39473 (2013), wherein the expert was excluded even though he had contacted two physicians; however, neither were named and there was nothing in the record that showed how the expert became aware of the local standard at the relevant time.

One pithy wording of the standard came from Justice Huntley in a concurring opinion in ***17** *Frank v East Shoshone Hospital*, when he wrote: “it does not take a Herculean effort for an expert to become familiar with the local standard of care. It can be done on the telephone.” 114 Idaho 480, 484, 757 P.2d 1199, 1203(1988).

***a. Nurse Wendy C. Thomason Is a Qualified Expert Who's Testimony Should Have Been Considered by the District Court.***

In the instant case, Nurse Thomason set forth her extensive experience in the nursing profession, in particular to her experience with skilled nursing facilities. She also set forth:

> I have worked as an expert witness in numerous cases around America. I am fully acquainted with the federal laws and regulations governing skilled nursing facilities and am acquainted with the applicable standard of care on the national level, as well as in various regions across the nation. I have provided expert witness services on cases in Idaho. I am also familiar with the Idaho laws and regulations governing skilled nursing facilities.

R, Vol. III, p. 494.

Nurse Wendy Thomason was familiar with the national standard, the state standard, and became familiar with the local standard at the relevant time by reading the affidavit of Carol McIver (which was conclusory, as will be address *infra*, and therefore unhelpful), reviewed the Center for Medicaid Services' (and other organizations') ratings and reviews for nursing homes in Lewiston in 2008 (R, Vol. III, p. 495; T, Vol. I (November 13, 2012), p. 21), reviewed the Idaho surveys (investigations of nursing homes) (T, Vol. I (Nov. 13, 2012), p. 21-22), and LCL's publications and state and national awards (R, Vol. III, p. 495), and 6000+ pages of LCL's records (R, Vol. II, p. 203), and then she interviewed four named local professionals: two doctors (Dr. Jane Fore and Dr. Jayme ***18** Mackay) and two nurses (Kelli Stellmon and Debbie Lemon) who knew the local standard. R, Vol. III, p. 495 -496; T, Vol. I (Nov. 13, 2012), p. 22.

Nurse Thomason was required to show that she a) familiar with the standard of care for that type of health care professional in the relevant community and time; and b) how she became familiar with that standard of care. *Dulaney*, at 164, 45 P.3e at 820. There are various methods by which an expert may become familiar with the specific standard of care; one of which is by inquiring of a local specialist *(Id)*, and Idaho courts have recognized that, for nursing homes and some other areas of health care, “governmental regulation, both at the state and federal level, has resulted in the establishment of minimum standards for dispensation of care”. These two areas will be addressed separately.

Nurse Thomason interviewed four local professionals as part of her efforts to ensure familiarization with the local standard of care: Dr. Jane Fore, Dr. Jayme Mackay, Nurse Debbie Lemon, and Nurse Kelli Stellmon. R, Vol. III, pp. 495-96. Each of the four knew the standard of care for nurses in a nursing home in 2008, and each had a different basis for that knowledge.

Dr. Fore is a physician who provides direct care to nursing home residents; she has worked with nurses in the region's nursing homes for several years and “has actual knowledge of the standard of care for nurses in a nursing home in the Lewiston region in 2008.” R, Vol. III, p. 495.

Dr. Jayme Mackay was the primary care physician for Rosamond Mattox until her death. He was involved in approximately 30 nursing exchanges with LCL regarding Ms. Mattox in 2008, ***19** which was more than for any of his other patients who were in nursing homes. He directed that specific orders be followed and was aware of additional orders as part of the Care Plan. R. Vol. III, p. 484. He was also the primary care physician for a number of nursing home residents, and had been for many years. R, Vol. III, p. 496. He reviewed his medical records, records from Tri-State Hospital and LCL. He is sufficiently aware of the standard of care for nurses in a skilled nursing facility to offer his opinion, to a reasonable degree of medical certainty (R, Vol. III, p. 483) that LCL breached that standard (R, Vol. III, p. 484.)

Dr. Mackay “is personally aware of the standard of care for nurses in nursing homes in the Lewiston region in 2008.” R, Vol. III, p. 496.

Nurse Kelli Stellmon is a registered nurse with over 20 years experience. She received her AAS from Eastern Idaho Vo-Tech in Idaho Falls in 1979, and received her AD in Nursing from Walla Walla Community College in Clarkston, Washington in 2008. In 2008, she was working as a Med/Surg nurse for Tri-State Hospital in Clarkston. Beginning in 2009 through 2011 she worked for Tri-State Home Health and Hospice. In 2011 she began working in the Tri-State Wound Healing Center where most of her

patients were **elderly**, diabetic, obese and/or have kidney disease. R, Vol. III, p. 526. She became familiar with the appropriate standard of care in this case by surveying nurses working in nursing homes in the Lewiston region. R, Vol. III, p. 496.

Debbie Lemon has years of experience as a Director of Nursing and Administrator for a nursing homes in the Lewiston area, as a nurse consultant and as a professor of nursing and was ***20** teaching the standard of care for skilled nursing providers to nursing students in the local nursing school in 2008. Nurse Lemon is a registered nurse with a Masters Degree in nursing with a focus on **Elderly** nursing/education. She is (and in 2008 was) an Associate Professor of Nursing, in the BSN program at Lewis-Clark State College teaching Assessments/Care plans and caregiver training. R, Vol. III, p. 495, 516. From the year 2000 until present she was the Nurse Consultant at Sycamore Glen (Adult Family Home). From 2004 - 2007 she was an Assistant Professor in the Practical Nursing Program at Lewis-Clark State College in Lewiston and taught the geriatric clinical rotation. Other relevant experience included time as the Nurse Consultant for Guardian Angel Assisted Living Homes and two years as the Administrator of Tri-State Health and Rehabilitation Center (a 104 bed nursing home in Clarkston, Washington), two years as Director of Nursing at Tri-State Health and Rehabilitation, and eight years as Administrator/Director of Nursing of Valley Rehabilitation and Living Center (now Orchards Nursing Center). Workshops and Conventions she attended included: Geriatric Nurse Educators Consortium (October, 2008), Teaching Geriatric Content (August, 2009). She is involved with the Alzheimer's Support Group and has provided assistance to Adult Family Homes by providing nurse delegation to staff, resident physical assessment, care plans, and administrative consultation from 2005 to present (again, working with the local standard of care). R, Vol. III, pp. 495, 516-23.

After taking the foregoing steps to familiarize herself with the standard of care, Nurse Thomason offered the opinion that:

> ***21** the standard of care for skilled nursing facilities in the Lewiston region during this time period was (as it generally remains) very similar to the standard of care for skilled nursing facilities nationwide. This is due, in large part, to the substantial regulation of this industry by the federal government. My opinions stated herein are addressed to this local standard of care as it existed in 2008. My opinions stated herein are opinions that I actually hold and are made to a reasonable nursing certainty.

R, Vol. III, p. 495.

With her background of understanding of the national standard and the state standard, and the research done, once Ms. Thomason was able to speak with the four local professionals she was familiar with the standard of care and able to offer her opinion thereon. Similar to the expert in *Pearson*, Nurse Thomason was able to demonstrate the requisite knowledge:

1) Nurse Thomason demonstrated that she was judging LCL "in comparison with similarly trained and qualified professionals in the same community, taking into account his or her training experience, and fields of medical specialization." I.C. § 6-1012. ("It is my opinion that the performance of the nursing staff of Life Care Center of Lewiston was an extreme deviation from the standard of care and nursing home practice standards for the Lewiston region in the state of Idaho for 2008..." R, Vol. III, p. 429.)

2) She is a "knowledgeable and competent expert witness." I.C. § 6-1013. ("I am a registered nurse, and have been since 1989. ... In that position I provide direct nursing care to adolescent through geriatric residents in a skilled nursing facility ...." R, Vol. III, p. 414-15; "it is evident that Ms. Thomason and her colleagues are well versed in the care of **elderly** ***22** patients ..." R, Vol. III, p. 598.)

3) She actually holds an opinion about the applicable standard of care and the failure of LCL staff to meet the standard. I.C. § 6-1013(a). ("My opinions state herein are opinions that I actually hold and are made to a reasonable nursing certainty." R, Vol. III, p. 418; "It is my professional opinion, within a reasonable degree of nursing probability,... that LCL nursing staff demonstrated a pattern of neglect and failure to exercise the standard of care..." R, Vol. III, p. 418; "It is my opinion that the performance of the nursing staff of Life Care Center of Lewiston was an extreme deviation from the standard of care ...." R, Vol. III, p. 428.)

4) Her opinion was rendered with "reasonable medical certainty." I.C. § 6-1013(b). ("It is my professional opinion, within a reasonable degree of nursing probability, ...." R, Vol. III, p. 418.)

5) She possessed "professional knowledge and expertise coupled with actual knowledge of the applicable ... community standards to which her ... expert opinion is addressed." I.C. § 6-1013(c). ("I have familiarized myself with the standard of care for skilled nursing facilities in the Lewiston region in 2008 and have become acquainted therewith and therefore I have knowledge of that standard of care." R, Vol. III, p. 415-516.)

Beyond all the foregoing, Ms. Thomason further addressed the breach of the state and federal standards that have been set for care in a nursing facility. As state above, Ms. Thomason noted that she is "fully acquainted with the federal laws and regulations governing skilled nursing facilities ...I ***23** am also familiar with the Idaho laws and regulations governing skilled nursing facilities." R, Vol. III, p. 415.

The fact that there are national standards for nursing homes and that those standards are applicable in Idaho is not a novel concept. Indeed, Idaho cases have already acknowledged such a principle. In the case of *McDaniel v. Inland Northwest Renal Care Group of Idaho, LLC,* 144 Idaho 219, 159 P.3d 856 (2007), the Court acknowledged that

> Recent years have witnessed increasing standardization in the health care profession, due to a variety of factors. Governmental regulation, both at the state and federal level, has resulted in the establishment of minimum standards for dispensation of care in specific areas, such as certain care standards applicable in the nursing home setting under HHS regulations, *Hayward*, and the adoption of certain national dental care standards in the State Dental Practice Act, *Grover v. Smith*, 137 Idaho 247, 250, 46 P.3d 1105, 1108 (2002).

*McDaniel*, at 224, 159 P.3d at 861.

The *McDaniel* court explained that not every regulatory scheme promulgated by the federal government establishes a standard of care; there are significant differences between regulations that govern the physical administration of health, and otherwise. It is only where the regulation concerns the administration of health services that they establish a standard which will be recognized. (*McDaniel* at 223, 159 P.3d at 860; *see also: Hayward v. Jack's Pharmacy Inc.*, 115 P.3d 713, 141 Idaho 622 (2005).)

In the instant case, the Idaho courts have already acknowledged that the HHS regulations have established certain care standards. Ms. Thomason also specifically avers that there is a national ***24** standard that is implicated and relates it to the local standard: "the standard for skilled nursing facilities in the Lewiston region during this time period was (as it generally remains) very similar to the standard of care for skilled nursing facilities nationwide. This is due, in large part, to the substantial regulation for this industry by the federal government," R, Vol. III, p. 496.

In her affidavit, Ms. Thomason also shows the applicability of state and federal regulations:

> State and federal regulations require skilled nursing facilities to observe and evaluate the condition of each patient or resident and develop a written individualized patient care plan which is to be based upon assessment of the needs of each patient or resident which must be kept current. Care plans are to include measurable objectives and timetables to meet the residents needs must describe services that are to be furnished to attain or maintain the residence highest practicable physical, mental, and psychosocial well-being as required under the federal regulations. State regulations require the development of the written care plan upon admission of a resident, and that the care plan is to be developed from a nursing assessment of the patient's needs, strengths and weaknesses; developed in coordination with other patient care services provided to the patient; written to include care to be given, goals to be accomplished, actions necessary to attain the goals. The care plan is to be reviewed and revised as needed to reflect the current needs of the patient and the current goals to be accomplished. It is to be available for use by all personnel caring

> for the patient. The patient's needs are to be recognized by nursing staff and nursing services are to be provided to assure that each patient receives care necessary to meet their total needs. Idaho nursing services rule requires changing position every two hours when confined to a bed or wheelchair and an opportunity for exercise to promote circulation and protection from accident or injury. Federal regulations require the facility ensure that each resident receives adequate supervision and assistance devices to prevent accidents. Attached hereto as Exhibit E is are [sic] true and correct copies of selected Federal and State statutes referenced in the foregoing. They are included by this reference as though set forth at length.

R, Vol. III, p. 505 - 06.

Ms. Thomason then covers some of the many ways in which LCL violated the regulations ***25** referenced above and included in the Exhibit. Examples include:

- in 2008, Ms. Mattox fell or was dropped nine (9) times in a 10 month period (the ninth fall was terminal) (R, Vol. III, p. 418, 424 - 25). These instances occurred despite both doctor's orders and care plans that required protective devices and additional supervision/assistance; the protective devices and additional supervision/assistance were routinely not used in violation of the orders, plans, and regulations (specifically: for the month of October 2008, Ms. Mattox was provided with siderails on her bed just 27 of 91 shifts and they were not in use at the time of the fatal fall; the bed was ordered to be in the low position to avoid or mitigate injuries should Ms. Mattox fall out, but in October 2008, the low bed was only used 9 out of 91 shifts; two (2) staff members were to assist Ms. Mattox in transferring out of or into bed or wheelchair to help prevent falls, but there was no documented use of two person transfer; etc.) (R, Vol. III, pp. 424 - 25);

- despite regulations that require that a resident change position every two hours when confined to a bed or wheelchair, in the final month of her life (October, 2008) Ms. Mattox only received check and change services 11 out of 91 shifts (R, Vol. III, p. 424);

- hip protectors had been ordered for Ms. Mattox to wear to mitigate against any injuries should she fall, but in her last months (July to October), during which time she fell and twice broke her hip, the protection was only used two (2) times. R, Vol. III, p. 425.

The list of violations is extensive; the result was the death of Ms. Mattox. The violations are summarized on pages 16-17 of Ms. Thomason's Amended Second Affidavit (R, Vol. III, pp 508 - ***26** 09).

The regulations cited to by Ms. Thomason are regulations for the administration of care; as such they are recognized as establishing a national standard of care, a standard LCL violated as set forth by Ms. Thomason.

For the foregoing reasons, it was error for the Court to strike Ms. Thomason's affidavit. This Court should reverse the District Court and remand with instructions.

***b. Dr. Jayme Mackay Is a Qualified Expert Who's Affidavit Is Sufficient and Should Not Have Been Struck.***

The District Court stated:

> ... Dr. Mackay's affidavits provide no information whatsoever regarding his knowledge of the local standard of care for nurses in a skilled nursing facility in Lewiston, Idaho in October, 2008.

R, Vol. III, p. 600-01.

However, such a finding is inconsistent with the record before the Court.

First, the principle that expert witnesses are not to required to be of the same specialty as the defendant is well established. *See: Pearson v Parsons*, at 337, 757 P.2d at 200; *Suhodolnik*, 151 Idaho at 116, 254 P.3d at 17.

Second, Dr. Mackay's position in this case is similar to, though distinguishably stronger than the position of the expert in *Newberry v Martens*, 142 Idaho 284,127 P.3d 187 (2005). In *Newberry* the expert was an opthalmologist whereas the defendant was a family practice physician. The court ***27** noted: "Dr. Martens correctly concedes that it is unnecessary for an expert witness to be of the same specialty as the defendant so long as the expert establishes he possesses actual knowledge of the standard of care to be applied, [citation omitted.]" *Newberry*, at 292, 127 P.3d at 195. However, the expert never explicitly asked a family practice physician what the standard of care in Twin Falls was. The expert testified "that he learned the standard of care by practicing alongside family physicians in Twin Falls, by providing and obtaining referrals, and by discussing patient care with them." *Id.* The admission of the expert testimony was upheld.

In the instant case, Dr. Mackay "never explicitly asked a [nurse] what the standard of care in Lewiston was." Rather he "learned the standard of care by practicing alongside [nurses] in [Lewiston nursing homes] ... and by discussing patient care with them." This is demonstrated through the affidavits before the Court.

Dr. Mackay was Rosamond Mattox' primary care physician. R, Vol. III, p. 484.

He worked with the nurses to provide care for Ms. Mattox. ("I had approximately 30 nursing exchanges with LCL regarding Ms. Mattox" in 2008. R, Vol, III, p. 484.)

He worked with nurses to provide care for other of his patients during this same time frame. ("I cannot think of any other patient I have had that has required so much interaction with the nursing staff at the nursing home." R, Vol. III, p. 484; he "is the primary physician for a number of nursing home residents, and had done so for years." R, Vol. III, p. 417.)

He discussed patient care with the nurses. ("I was made aware of a number of meetings with ***28** nurses and administrators that were called because Gene or Sandra were concerned about whether the care being provided was the right care." R, Vol. III, p. 485. "I requested specific order be carried out for the safety and well-being of Ms. Mattox ...." R. Vol. III, p. 484.)

He knew the standard of care. ("He is personally aware of the standard of care for nurses in nursing homes in the Lewiston region in 2008." R. Vol. III, p. 417.)

The notable distinction between the *Newberry* expert and Dr. Mackay is that Dr. Mackay was personally involved in providing care **for this person, in the defendant's facility, at the time of the alleged malpractice**. He has both first-hand, and expert knowledge of the events.

Like the expert in *Newberry*, his basis for knowing the applicable standard of care comes from direct relationship and working with the profession in question. Unlike the expert in *Newberry*, Dr. Mackay had an unfortunate front-row seat to observe and learn the standard and see the breach; a breach about which he testified ("to a reasonable degree of medical certainty" (R, Vol. III, p. 483)):

It is my professional opinion that Rosamond Mattox died as a result of an unbroken and reasonably anticipated chain of events that arose as a result of Life Care Center of Lewiston failing to provide and use the cautions which had been ordered (either by me or the Care Plan). The failure to use those cautions was a breach of the standard of care that was owed by Life Care Center of Lewiston to Rosamond Mattox

...

R, Vol. III, p. 484.

The record is substantial and sufficient; and Dr. Mackay's affidavit should not have been struck. This court should reverse the District Court and remand with instructions.

***29** ***2. The Affidavit of Carol Mclver is ineffective to support the Defendant's motion.***

The Defendants moved for summary judgment pursuant to I.R.C. P. 56. The bringing of the motion places a burden on them to come forward with admissible facts to support their claim that there is no genuine issue of material fact.

The Defendants brought forth a solitary, nine-sentence affidavit to meet this burden.

Ms. Mclver's affidavit, with its attached curriculum vitae, is sufficient to establish facts to support that she knew the "standard of care practice applicable to the care and treatment of Rosamond Mattox in October 2008 for a facility such as Life Care Center of Lewiston in Lewiston, Idaho." R, Vol. I, p. 41.

I.R.C.P. 56(e) requires that an affiant have personal knowledge of the facts contained within an affidavit, and that the statements contained within such an expert affidavit cannot be conclusory statements of fact.

For those who are to be experts, like Ms. McIver, there are foundational requirements that must be met prior the to consideration of their affidavit. These foundational requirements have been discussed exhaustively *supra* and will not be further covered here, except to note that Ms. McIver's affidavit is ineffective in meeting those requirements.

Beyond the foundational requirements, I.R.C.P. 56(e) requires that affidavits submitted on a motion for summary judgment must "set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." ***30** *Suhodolnik v. Pressman*, 151 Idaho 110, 116, 254 P.3d 11, 17 (2011); I.R.C.P. 56 (e). "The affiant must have personal knowledge of the facts contained within the affidavit and statements within it ***cannot be conclusory or speculative." Id.*** (Citing *Dulaney* at 164, 820) (Emphasis added.)

Again, due to the self-serving and conclusory nature of the affidavit, Ms. McIver's affidavit is ineffective at meeting the necessary threshhold.

As stated above, the Defendants rely entirely upon the solitary affidavit from Ms. McIver, containing a total of nine (9) sentences. Her entire testimony to establish her basis of knowledge of care and her opinion there on is as follows:

> I am familiar and have actual knowledge of the care provided by Life Care Center of Lewiston as it pertains to Rosamond Mattox. I have also researched her care and medical records from Life care Center of Lewiston, to include the time in question. It is my opinion that Life Care Center of Lewiston provided proper supervision, was staffed appropriately, and did provide the proper care required for Rosamond Mattox. Based on my actual knowledge of the applicable standard of health care practice, as it applies to the care provided by Life Care Center of Lewiston, it is my opinion, which opinion I hold to a reasonable degree of medical certainty, that the care and treatment provided to Rosamond Mattox by the staff at Life Care Center of Lewiston complied in all respects with the applicable standard of health care practice.

R, Vol. I, pp. 41 - 42.

As argued to the District Court:

> Counsel has adequately set forth in her motion to strike the requirements necessary for an expert to be able to opine and for that opinion to be properly before the Court. Rather than belaboring that law the undersigned points to it as support for the proposition that the Affidavit of Carol McIver is incompetent to establish any fact or basis for a dispute. Its self-serving nature is not a basis to ignore its contents, but its conclusory nature, wholly without substance and foundation, leaves it ineffective. **The Defendants' Answer is a general denial and offers no support for their *31 motion; they are left with a bare motion supported by a vague and conclusory affidavit**. It should be noted that Defense counsel also has an affidavit before the court with several exhibits of what are claimed to be records relating to this case. Even ignoring that counsel is an incompetent witness, as counsel sets forth in her own motions and memoranda, this is an area that requires expert testimony and the mere presence of records does not create an issue of fact for the court.

R, Vol. II, p. 410 (emphasis added).

As the Court stated in *Suhadolnik v. Pressman*, 151 Idaho 110, 254 P.3d 11 (Idaho 2011): "The affiant must have personal knowledge of the facts contained within the affidavit and statements within it cannot be conclusory or speculative. *Dulaney*, 137 Idaho at 164, 45 P.3d at 820."

It is true that the McIver affidavit, with its attached Vitae, is sufficient to establish her personal knowledge; however, everything else remains conclusory. As the *Dulaney* Court reiterated: "Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency under Rule 56(e)." (*Dulaney*, at 164, 45 P.3d at 820, citing *Kolln v St. Luke's Reg 'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997).

The nine sentence affidavit of McIver being conclusory, it therefore does not satisfy either the requirement of admissibility or competency under the rule, and being ineffective, it cannot support the burden of a summary judgment.

### C. Summary Judgment

#### *1. The burden on summary judgment never shifted to Plaintiffs, therefore summary judgment should not have been granted in favor of Defendants*

***32** Given Defendants' reliance on an insufficient affidavit, the burden on summary judgment never shifted. As the Supreme Court stated in *Pearson*:

if a defendant seeks summary judgment in a medical malpractice case, the supporting affidavits or other evidence must show that there is no genuine issue of material fact and that defendant is entitled to judgment as a matter of law. I.R.C.P. 56(c). Merely filing a motion for summary judgment is not sufficient to place the burden on the adverse party to establish that there is a genuine issue of material fact. The motion must be supported as provided in I.R.C.P. 56 in order to invoke the requirement that "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e).

*Pearson*, at 338, 757 P.2d at 201.

The affidavit of Ms. McIver is admissible, though ineffective; the burden never shifted and as a result, the District Court erred in granting summary judgment in favor of Defendants and further erred by not granting summary judgment in favor of Plaintiffs. This Court must reverse the District Court's ruling.

***2. With an Ineffective Affidavit for Defendants and Admissible Expert Affidavits for the Plaintiffs, the District Court Should have Granted Summary Judgment in Favor of Plaintiffs.***

In 2011, the Supreme Court affirmed the principle that summary judgment may be awarded in favor of the non-moving party (against the moving party). In *Fuller v Dave Callister*, 150 Idaho 848, 252 P.3d 1255 (2011), the court quoted, with approval, *Harwood v Talbert*:

The district court may grant summary judgment to a non-moving party even if the party has not filed its own motion with the court. A motion for summary judgment allows the court to rule on the issues placed before it as a matter of law; the moving ***33** party runs the risk that the court will find against it ...

In instances where summary judgment is granted to the non-moving party, this Court liberally construes the record in favor of the party against whom the judgment was entered. The party against whom the judgment will be entered must be given adequate notice and opportunity to demonstrate why summary judgment should not be entered. It is also true that a district court may not decide an issue not raised in the moving party's motion for summary judgment.

[citations omitted.]

*Fuller*, at 851, 252 P.3d at 1269.

In the instant case, the Defendants were put on notice via Plaintiffs responsive brief *(see: R. Vol. II*. pp. 402 - 413. Despite the notice, Defendants insisted on continuing to rely solely on the nine (9) sentence affidavit of Carol McIver.

With the record before the district court consisting of the Defendants' solitary affidavit and the total of four affidavits from Dr. Mackay and Nurse Thomason, who (as has been shown) met the requirements to be expert witnesses before the Court, the Defendants were unable to demonstrate *a genuine* issue of fact, while the Plaintiffs established facts of the breach of the standard of care and proximate cause of the death of Ms. Mattox. With such a record, summary judgment should have been granted in favor of Plaintiffs and against the Defendants.

This court must reverse the district court and grant summary judgment in favor of Plaintiffs, against Defendants, and then remand with instructions for a trial on the issue of damages only.

## ***34** *IV. CONCLUSION*

For the foregoing reasons, the affidavits of Wendy C. Thomason and Dr. Jayme Mackay should not have been stricken and the District Court must be reversed. Further, summary judgment should not have been granted in favor of Defendants, and again the District Court must be reversed. Finally, with the status of the record as it exists, summary judgment should be granted in favor of Plaintiffs, and this action be remanded with instructions for trial to establish damages.

Respectfully submitted this *5* day of December, 2013.
*/s/*

Todd S. Richardson

Attorney for Plaintiffs / Appellants

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